

RCRA regulations and
environmental covenants:
Is a more boring topic imaginable?

Dan Miller
Colorado Department of Law
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The Issue

- RCRA regulations do not reflect recent developments in thinking about institutional controls
 - Specifically, trend toward adoption of statutory provisions for institutional controls
- Examples
 - 264.116 (file survey plat w/ zoning agency stating obligation to restrict disturbance)
 - 264.119(b) (record deed notation that use of property is restricted under subpart G)
 - Do these actions bind subsequent owners?

The solution

- Modify the regulations!
- First, define your terms
 - E.g., “Environmental covenant means an instrument containing environmental use restrictions created pursuant to § 25-15-321, C.R.S.”
- Evaluate how your state covenant law applies to closures of regulated units
 - EC appropriate for cleanup/closure incorporating engineered structure or with residual contamination above unrestricted use (i.e., all closures of regulated units)

The nitty-gritty: amending Part 264, Subpart G

- § 264.118 -- Plan ahead!
 - Post-closure plan should include a draft environmental covenant, including proposed use restrictions
- § 264.115 -- Certification of closure
 - Should require proposed covenant plus title info shortly before certification of closure
 - Timing based on need for survey, current status of property ownership

Subpart G amendments, cont'd.

- §§ 264.116 and 119 – survey plat and post-closure notices
 - survey plat under existing § 264.116 may not bind subsequent owners
 - Should amend to require plat to reference environmental covenant
 - Deed notice in existing 264.119 may not be not binding on subsequent owners
 - Should amend to require recordation of covenant
 - Need to coordinate modification of post-closure permit with EC modification (264.119(c))

Subpart G amendments, cont'd.

- 264.117 – post-closure care and use of property
 - Uses may not disturb integrity of engineered components, unless agency approves because:
 - Necessary to proposed use of property, and won't increase hazard to HH & E; or
 - Necessary to reduce threat to HH & E
 - Should amend to also require modification of any EC

Subpart N

- Should amend § 264.310(b) to require compliance with EC

Post-closure permit application

- Regulations require documentation of compliance with 264.119 deed notice requirement; should be amended to refer to environmental covenant

Corrective action

- Most corrective action implemented through guidance, not in regulation
 - EC guidance should address:
 - Need to analyze IC's as part of corrective measures study
 - When to require draft EC
 - When to require title information
 - When to require final EC
- Colorado guidance
 - Final covenant required at time of final corrective action decision (IC only cleanup); or when physical remedy has been constructed
 - <http://www.cdphe.state.co.us/hm/envcovenants.asp>

Food chain crops

- 264.276 allows food chain crops to be grown in land treatment units under certain circumstances
- In some cases, institutional controls are required
- This section (and § 264.280) will require some amendments to incorporate EC references

Miscellaneous units

- § 264.603 should be amended to reference EC requirement

Part 265

- Same as Part 264, with one addition
- § 265.121 (enforceable documents in lieu of post-closure permits)
 - 121(a) should be amended to require compliance with EC

Still Awake? Get a cat!

